TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1956

No. ~~710~~ 70

ALBERT L. TROP, PETITIONER,

vs.

JOHN FOSTER DULLES, SECRETARY OF STATE OF THE UNITED STATES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 24, 1957

CERTIORARI GRANTED MARCH 4, 1957

SUPREME COURT OF THE UNITED STATES

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INDEX

	Original	Print
Proceedings in the United States Court of Appeals for the Second Circuit	1	1
Appendix to Appellant's brief consisting of proceedings in United States District Court for the Eastern District of New York	1	1
Statement under Rule 15(b)	1	1
Plaintiff's motion for summary judgment	2	1
Affidavit of Albert L. Trop	3	2
Exhibit A—Summary of record of Court Martial	5	4
Opinions, Inch, J.	6	5
Judgment	7	5
Appendix to Appellee's brief consisting of one paper filed in United States District Court for the Eastern District of New York	9	7
Court martial order certified January 12, 1956	9	7
Opinion, Hand, J.	14	10
Dissenting opinion, Clark, J.	18	13
Judgment	19	14
Clerk's certificate (omitted in printing)	21	
Order allowing certiorari	22	15

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—4405-7

[fol. 1]

IN UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Civ. No. 16144

ALBERT L. TROP, Plaintiff-Appellant,

against

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE, Defendants-Appellees

Appendix to Appellant's Brief

STATEMENT UNDER RULE 15(b)

This action was commenced by the filing of the complaint on December 29, 1955. Both parties moved for summary judgment. Judge Inch granted defendant's motion and denied plaintiff's. Judgment was entered on May 31, 1956.

[fol. 2] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT—March 16, 1956

Sir:

Please take notice that plaintiff, on the pleadings herein and on his affidavit sworn to March 16, 1956, will move this Court, at a Motion Part thereof, to be held in the United States Courthouse, in the Post Office Building, Borough of Brooklyn, City of New York, on April 4th, 1956, at 10 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for summary judgment in plaintiff's favor declaring that he has not lost his United States citizenship, and for such other and further relief as to the Court may seem just and proper.

Dated: March 16, 1956.

Yours, etc., Osmond K. Fraenkel, Attorney for Plaintiff, Office & P. O. Address, 120 Broadway, New York 5, N. Y.

To: Leonard P. Moore, Esq., United States Attorney, Eastern District of New York, Attorney for Defendants, 271 Washington Street, Brooklyn 1, N. Y.

[fol. 3] In United States District Court, Eastern District of New York

Affidavit of Albert L. Trop in Support of Motion

State of New York,
County of New York, ss:

Albert L. Trop, being duly sworn, deposes and says:

I am the plaintiff herein. This action is brought under § 1503, Title 8, United States Code, for a declaratory judgment with regard to my United States citizenship.

I am a native born citizen and was born in Akron, Ohio, on February 7, 1924. For several years past I have been and still am residing with my wife at 65 Lincoln Blvd., Long Beach, Nassau County, State of New York, which is within the jurisdiction of this Court. I have been for some years employed by an aviation concern. The complaint alleges and it is admitted that in 1952 I applied for a passport which was refused on the ground that I had lost my American citizenship and that this claim by the Department of State rested on a court martial and dishonorable discharge from the United States Army on the ground of desertion in time of war. The Department of State claims that this conviction resulted in a loss of my native born citizenship by reason of § 401(g) of the Nationality Act of 1940, which is now § 1481(8) of Title 8 of the United States Code.

At no time did I intend to expatriate myself or become a national of any other country than the United States. I have always considered myself an American citizen owing allegiance to the United States and to no other country. I [fol. 4] have not become a foreign national, nor have I ever intended to do so. At no time did I attempt to have any contact with any enemy of the United States or to desert to any enemy of the United States or to any foreign country,

and no claim was made in the court martial proceedings that I had done so.

The occurrence which formed the basis of my conviction arose in Casablanca in May 1944, when I was 20 years old. While confined there for an earlier breach of discipline, I found the conditions so intolerable that in desperation I escaped, but the next day I surrendered. I made no attempt to leave the area under control of American troops and did not even try to reach the Spanish-Moroccan border although I was within 30 miles of it. A summary of the court martial proceedings is annexed and marked Exhibit A.

It is my contention that if the statute relied upon by the State Department is applied to my case the same is unconstitutional as in excess of the power of Congress to deal with native-born citizens.

As appears in the accompanying brief, this contention rests upon the constitutional principle that Congress has no power to take away the nationality of native born citizens, except where they have actually become nationals of other countries or by their own act indicated an intention to become such foreign nationals. Whatever application this statute might constitutionally have to the case of a native born American who actually deserted to the enemy in time of war, I submit that it can have no constitutional application to my own case.

I therefore respectfully request the Court to grant summary judgment declaring the act in question unconstitutional either on its face or as applied.

Albert L. Trop.

(Sworn to March 16, 1956.)

[fol. 5] EXHIBIT A, ANNEXED TO AFFIDAVIT OF ALBERT L. TROP

SUMMARY OF RECORD OF COURT MARTIAL

(Special Order No. 134 Held June 7, 1944 at Casablanca.)

Charge I

Specification 1: Escape on May 9, 1944 (p. 10).
Specification 2: Escape on May 22, 1944 (p. 10).

Charge II

Specification: Absence for 3 hours on May 9, 1944 (p. 11).

Charge III

Specification: Desertion from May 22 to May 23, 1944 (p. 11).

The testimony with reference to Charge III (which alone is relevant here) commences at p. 59.

First Lieut. Derr testified that on May 23rd he was in a truck going from Meknes to Rabat and saw plaintiff who *h*old him he was from the hospital and he and a companion boarded the truck and were turned over to the military police in Rabat (p. 61). They got in without any argument and made no attempt to leave the truck (p. 62).

Technical Sergeant Helen L. Cochran testified that she was in the truck (p. 73), that plaintiff and another "willingly got in the truck although nothing was said;" (p. 74), and that they were walking in the direction of Rabat (p. 75). [This is in the direction of Casablanca and away from Spanish Morocco.]

Plaintiff himself said: "My organization is now in Italy. I thought it would be possible for me to rejoin my organization, and there I might get a Brigade Commander that would reopen my case. At the time that Lieutenant Derr picked us up we had decided to return to the stockade. The going was tough. We had no money to speak of, and at the time we were on foot and we were getting cold and hungry" (p. 76).

[fol. 6] IN UNITED STATES DISTRICT COURT

OPINIONS—May 22, 1956

Motion by plaintiff for summary judgment declaring that he has not lost his United States citizenship. Although the papers herein show that there is no genuine issue as to any material fact, they do not show that plaintiff is entitled to a judgment as a matter of law. Therefore, this motion must be and hereby is denied. Settle order.
May 22, 1956.

Robert A. Inch, Chief Judge, U. S. D. C.

Motion by defendants for summary judgment dismissing the complaint, wherein plaintiff asks for judgment declaring that he has not lost his United States citizenship.

The papers herein show that there is no genuine issue as to any material fact and that plaintiff has lost his United States citizenship by being convicted by court martial of deserting the U. S. military forces in time of war and, as a result thereof dishonorably discharged from the service of such military forces, the defendants are entitled to a judgment as a matter of law. Therefore, this motion must be and hereby is granted. Settle order.
May 22, 1956.

Robert A. Inch, Chief Judge, U. S. D. C.

[fol. 7] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF NEW YORK

JUDGMENT—Entered May 31, 1956

At Brooklyn, New York, in said District on the 31st day of May, 1956.

The plaintiff having moved this Court by notice of motion dated March 16, 1956 for summary judgment declaring that he has not lost his United States citizenship, and defendants having cross moved by notice of motion dated April 25, 1956 for an order granting summary judgment dismissing the complaint, and plaintiff having appeared by Osmond K. Fraenkel, Esq., in support of the motion and

in opposition to the cross motion and defendants having appeared by Leonard P. Moore, United States Attorney for the Eastern District of New York, Margaret E. Millus, Assistant United States Attorney, of counsel, in opposition to the motion and in support of the cross motion, and upon reading the affidavit of Albert L. Trop, sworn to the 16th day of March, 1956, in support of the motion, and the affidavit of Margaret E. Millus, sworn to the 25th day of April, 1956, in support of the cross motion, and upon all the papers filed and proceedings heretofore had herein and due deliberation having been had thereon, and upon filing the decisions of the Court

Now, on motion of Leonard P. Moore, United States Attorney for the Eastern District of New York, attorney for the defendant, it is

[fol. 8] ORDERED that the plaintiff's motion for summary judgment declaring that he has not lost his United States citizenship be and the same hereby is denied, and it is further

ORDERED that the defendant's motion for summary judgment dismissing the complaint be and the same hereby is granted.

Robert A. Inch, U. S. D. J.

Judgment entered

May 31, 1956.

Clerk.

[fol. 8a] UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 24184

ALBERT L. TROP, Plaintiff-Appellant,

against

JOHN FOSTER DULLES, as Secretary of State of the United States, and UNITED STATES DEPARTMENT OF STATE, Defendants-Appellees

Appellees' Appendix

[fol. 9] IN UNITED STATES DISTRICT COURT

COURT MARTIAL ORDER CERTIFIED JANUARY 12, 1956, SETTING FORTH APPELLANT'S CONVICTION BY COURT MARTIAL ON JUNE 13, 1944 FOR DESERTING THE SERVICE OF THE UNITED STATES DURING TIME OF WAR

United States of America

Department of the Army

Washington, 12 January, 1956.

I hereby certify that the attached document pertaining to the General Court-Martial of General Prisoner Albert L. Trop (formerly Private, 19028254, Hq. & Hq. Btry, 18th F. A. Brigade) is a true and correct copy of general Court-Martial Orders No. 191, Headquarters Atlantic Base Section APO 759, dated 13 June 1944, which is on file in the Office of The Judge Advocate General Department of the Army, Washington 25, D. C.

Eugene M. Caffey, Major General, USA, The Judge Advocate General.

I hereby certify that Major General Eugene M. Caffey, who signed the foregoing certificate is The Judge Advocate General of the Army, and as such has the legal custody of the records herein described, and that to his certification as such full faith and credit are and ought to be given.

In testimony whereof I, Wilbur M. Brucker Secretary of

the Army, have hereunto caused the seal of the Department [fol. 10] of the Army to be affixed and my name to be subscribed by the Deputy Administrative Assistant of the said Department, at the City of Washington, this 12th day of January, 1956.

Wilber M. Brucker, Secretary of the Army, by James C. Cox, Deputy Administrative Assistant. [Seal.]

General Court-Martial

Orders No. — 191-

Headquarters Atlantic Base Section

A. P. O. 759, 13 June 1944

Before a general court-martial which convened at Casablanca, French Morocco pursuant to paragraph 1, Special Orders No. 134, Headquarters Atlantic Base Section, A. P. O. 759, 7 June 1944, was arraigned and tried:

General Prisoner Albert L. Trop, (formerly Private, 19028254, Hq & Hq Btry, 18th F. A. Brigade).

Charge I: Violation of the 69th Article of War.

Specification 1: In that General Prisoner Albert L. Trop, (formerly Private, Hq & Hq Btry, 18th F. A. Bri- [fol. 11] gade), having been duly placed in confinement in the NATOUSA Disciplinary Training Center on or about 18 March 1944 and having been transferred to Stockade, 50th Station Hospital, Atlantic Base Section, on or about 4 April 1944, did, at or near Casablanca, French Morocco on or about 9 May 1944 escape from said confinement before he was set at liberty by proper authority.

Specification 2: In that General Prisoner Albert L. Trop, (Formerly Private, Hq & Hq Btry, 18th F. A. Brigade), having been duly placed in confinement in Stockade Number Two, Atlantic Base Section, on or about 9 May 1944, did, at or near Casablanca, French Morocco on or about 22 May 1944, escape from said confinement before he was set at liberty by proper authority.

Charge II: Violation of the 61st Article of War.

Specification: In that General Prisoner Albert L. Trop, (formerly Private, Hq & Hq Btry, 18th F. A. Brigade), did, without proper leave, absent himself from his station at Stockade, 50th Station Hospital, Atlantic Base Section, from about 0745 hours 9 May 1944 to about 1030 hours, 9 May 1944.

Charge III: Violation of the 58th Article of War.

Specification: In that General Prisoner Albert L. Trop: (formerly Private, Hq & Hq Btry, 18th F. A. Brigade), [fol. 12] did, at or near Casablanca, French Morocco on or about 22 May 1944, desert the service of the United States and did remain absent in desertion until he was apprehended at or near Moknes, French Morocco on or about 23 May 1944.

Pleas

To specification 1 of Charge I: Not Guilty.

To specification 2 of Charge I: Not Guilty.

To Charge I: Not Guilty.

To the specification of Charge II: Not Guilty.

To Charge II: Not Guilty.

To the specification of Charge III: Not Guilty.

To Charge III: Not Guilty.

Findings

Of all specifications and charges: Guilty.

Sentence

To be dishonorably discharged the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three (3) years.

The sentence was adjudged on 9 June 1944.

The sentence, although inadequate, is approved and will be duly executed in order that the accused will not entirely escape punishment, but the execution of that portion thereof [fol. 13] adjudging dishonorable discharge is suspended until the soldier's release from confinement. NATOUSA

Disciplinary Training Center, Oran, Algeria is designated as the place of confinement.

GCMO # 191, 13 June 1944, contd.

By order of Colonel Pugh. William R. Schaefer, Colonel, General Staff Corps, Chief of Staff.

Official: N. W. Clunn, CWO USA, Asst. Adj. Gen.
Distribution: "Special".

[fol. 14] In United States Court of Appeals, for the Second Circuit—October Term, 1956

No. 63

(Argued October 11, 1956)

Docket No. 24184

Albert L. Trop, Plaintiff-Appellant,

v.

John Foster Dulles, as Secretary of State of the United States, and United States Department of State, Defendants-Appellees.

Before: Clark, *Chief Judge*, Hand and Swan, *Circuit Judges*.

On appeal from a judgment of the District Court for the Eastern District of New York (Inch, *Chief Judge*, presiding), summarily dismissing the complaint in an action brought for a judgment declaring that the plaintiff had not lost his "nationality" because of desertion from the United States Army "in time of war."

Osmond K. Fraenkel, for the Appellant.
Margaret E. Millus, for the Appellee.

[fol. 15] Opinion—December 28, 1956

Hand, *Circuit Judge*:

The plaintiff appeals from a judgment, summarily dismissing his complaint in an action under § 1503(a) of Title 8, U. S. Code, for a judgment declaring him to be "a na-

tional of the United States." He is a native citizen, who was serving in 1944 in the United States Army in French Morocco; and the only question is whether he lost his "nationality" because he was convicted by the judgment of a court-martial of desertion "in time of war." The sentence of the court was that he was "to be dishonorably discharged from the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor * * * for three (3) years." Since the judgment of the district court was summary we are to accept as true the statements in the plaintiff's affidavit upon the motion that he had been imprisoned in Casablanca in May 1944 for an earlier breach of discipline, and found the condition so intolerable that in desperation he escaped. The next day he surrendered; and meanwhile he had made no attempt to leave the area under control of American troops. He had had no intention to "expatriate" himself or to become a national of any other country. Nor did he attempt to have any contact with any enemy of the United States, or to desert to any enemy of the United States, or to any foreign country; and no claim was made in the court-martial proceedings that he had done so.

As will appear, we do not find enough doubt of the constitutionality of the statute to resort to any but the natural meaning of the words; *i.e.*, that "in time of war" desertion of any kind results in "expatriation." Indeed, the proviso for possible restoration of "nationality" makes it impossible to suppose that the crime was confined to desertion to the enemy. It was true that at common law no subject could throw off his allegiance, and apparently the sovereign [fol. 16] could not "expatriate" him. However, the Supreme Court, in *Mackenzie* v. *Hare*, 239 U.S. 299, held that the Act of 1907 (34 Stat. 1228) was valid which "expatriated" a woman who married an alien in this country; and that too although she had not intended to surrender her citizenship, and did not suppose that she was doing so. Again, in *Savorgnan* v. *United States*, 338 U.S. 491, a native citizen in 1940 married a citizen of Italy then in this country, and between 1941 and 1945 lived with him in Italy as his wife. She came back to this country on an Italian passport, and the action, like that at bar, was to obtain a judgment recognizing her continued status as a citizen, on the ground that, al-

though she knew that she was being naturalized as an Italian (that being a condition, as her husband told her, of the validity of her marriage), she did not know that she would forfeit her American status, and did not intend to surrender it. Nevertheless the court held that under the Act of 1940 she had done so, because her "place of general abode" between 1941 and 1945 had been Italy (§ 1101(33), Title 8, U.S.C.). See also *Beredin* v. *Acheson*, 194 F. 2d 482 (C.A. 2), certiorari denied 344 U.S. 820.

The important point in both these decisions is, not the especial "objective" facts that the court accepted as the test, but that on both occasions the citizen forfeited her "nationality," not only without supposing that she was doing so, but against her purpose. It is true that the act must not be that of an infant, *Perkins* v. *Elg*, 307 U. S. 325, 334: "Expatriation is the voluntary renunciation of abandonment of nationality and allegiance. It has no application to the removal from this country of a native citizen during minority. In such a case the voluntary action which is of the essence of the right of expatriation is lacking." We will also assume, *arguendo*, that the same is true when the act is under duress;* but when it is voluntary and [fol. 17] the actor is *sui juris*, it is not necessary that he shall be aware that what he does will "expatriate" him, any more than it is in many other situations where the law imposes liability regardless of the actor's knowledge of the legal effects of his act.

There is still another reason why we may not limit the word "desertion" to desertion to an enemy of the United States. Section 1483(a) of Title 8 provides that, except for subsections 7, 8 and 9, none of the acts mentioned in § 1481, shall result in "expatriation" if they occur within the United States, unless they are followed by a "residence outside the United States." Subdivision 7 provides for a "formal written renunciation," subdivision 9 is for treason and subdivision 8 is the one at bar. Thus Congress provided that "in time of war" desertion within the United States should at once and unconditionally result in "expa-

* See *Mandoli* v. *Acheson*, 344 U.S. 133.

triation" if determined by the conviction of a court-martial, and it would be most unreasonable to confine desertions "within the United States" to desertions to an enemy.

We have not considered, and do not consider, whether under the circumstances at bar "expatriation" was, or was not, a "cruel and unusual" punishment under the Eighth Amendment. The plaintiff did not suggest anything of the kind in his complaint, or upon the motion for summary judgment: Judge Inch did not mention it in disposing of the motion, nor did the plaintiff do so in argument. The only part of the brief that by the widest latitude could be considered as so much as a vague intimation of the sort is a passage on page 11; and that did not mention the Amendment, but appears to be a part of the general argument that all involuntary expatriation is a denial of "Due Process of Law."

Judgment affirmed.

[fol. 18] CLARK, *Chief Judge* (dissenting):

I am constrained to disagree with both the substance and the procedural form of the result here reached. Plaintiff-appellant has cited to us and obviously relied on the masterful analysis of expatriation legislation set forth in the Comment, *The Expatriation Act of 1954*, 64 Yale L. J. 1164, 1189-1199. I agree with the author's documented conclusions therein that punitive expatriation of persons with no other nationality constitutes cruel and unusual punishment and is invalid as such. Since I doubt if I can add to the persuasive arguments there made, I shall merely incorporate by reference. In my faith, the American concept of man's dignity does not comport with making even those we would punish completely "stateless"—fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all.

On procedure I think we are bound as judges to face and decide this issue. It is unfair to the capable and experienced lawyer who presented this appeal to hold that he did not present this argument. For what other possible reason could he have made the specific and exact citation I have given above? His refreshingly brief statement, I conceive,

needed no more. But I had supposed that we were bound in any event to do justice and administer the law as between the parties who have come before us.

[fol. 19] In United States Court of Appeals for the Second Circuit

Present: Hon. Charles E. Clark, Chief Judge, Hon. Learned Hand, Hon. Thomas W. Swan, Circuit Judges.

Albert L. Trop, Plaintiff-Appellant,

v.

John Foster Dulles & United States Department of State, Defendants-Appellees

Appeal from the United States District Court for the Eastern District of New York. Judgment—December 28, 1956.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of the said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk.

[fol. 20] [File endorsement omitted.]

[fol. 21] Clerk's Certificate to foregoing transcript omitted in printed.

[fol. 22] SUPREME COURT OF THE UNITED STATES

October Term, 1956

No. 710

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 4, 1957

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted; and the case is transferred to the summary calendar. The case is assigned for argument immediately following No. 572 and No. 415. The brief of counsel for the petitioner shall be filed by March 30, 1957, and that of the respondent by April 26, 1957.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(4405-7)